

DOW, LOHNES & ALBERTSON

A PROFESSIONAL LIMITED LIABILITY COMPANY

ATTORNEYS AT LAW

RICHARD S. DENNING
DIRECT DIAL 202-776-2638

WASHINGTON, D.C.
1200 NEW HAMPSHIRE AVENUE, N.W. • SUITE 800 • WASHINGTON, D.C. 20036-6802
TELEPHONE 202-776-2000 • FACSIMILE 202-776-2222

ONE RAVINIA DRIVE • SUITE 1600
ATLANTA, GEORGIA 30346-2108
TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

August 1, 1996

DOCKET FILE COPY ORIGINAL

RECEIVED

AUG 1 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

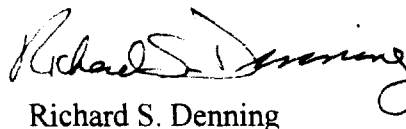
Re: **Erratum**
Devon Mobile Communications, L.P.
Petition for Reconsideration
WT Docket No. 96-59; GN Docket No. 90-314

Dear Mr. Caton:

Please find enclosed a revised page 6 of the Petition for Reconsideration filed yesterday in the above-referenced dockets on behalf of Devon Mobile Communications, L.P. ("Devon"). The revised page corrects a typographical error in Section III of the pleading and does not modify the substance of the Petition. Accordingly, please substitute the attached page for page 6 of the original filing.

For your convenience, I am enclosing herewith a complete and corrected copy of Devon's Petition for Reconsideration. If you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,


Richard S. Denning

Encl.

Finally, the Commission's concern regarding insincere bidding is equally unfounded as a basis to impose more onerous payment obligations on F Block licensees. In the C Block auction only two out of 89 winning bidders defaulted based on their unique circumstances. There is no evidence that the Commission's C Block installment payment plan contributed to the default or encouraged speculative bids.^{9/} That the actual cost of the license is not recognized until later in the license term is the very benefit the Commission now inexplicably views as potentially dangerous. The Commission comes to this conclusion without any evidence of PCS licensees ultimately defaulting late in the license term, once the stepped-up installment payments are required. To date, no PCS licensee has defaulted on its payment obligations because its installment payments have increased to include principal payments.

Accordingly, before the auction commences, the Commission should conform its F Block small business interest and principal payment provisions to those applied in the C Block auction. Unless adequate financial incentives are in place to promote and support small business participation in the F Block auction, the Commission, by its own design, will undermine the successes achieved in the C Block auction.

III. The Record Does Not Support the Substantial Increase in the F Block Down Payment Requirements

Under prior rules, small businesses were required to submit a down payment of 10 percent of the value of the net high winning bids to hold PCS licenses set aside for designated

^{9/} Indeed, the defaults which have occurred have been precipitated by events which could not have been predicted, rather than by speculation or bad faith bidding. See e.g., Petition for Reconsideration, BDPCS, Inc. (filed May 22, 1996); see National Telecom PCS, Inc. Request for Waiver of Bid Withdrawal Payment (filed May 15, 1996).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Parts 20 and 24 of the)	WT Docket No. 96-59
Commission's Rules -- Broadband)	
PCS Competitive Bidding and the)	
Commercial Mobile Radio Service)	
Spectrum Cap)	
)	
Amendment of the Commission's)	GN Docket No. 90-314
Cellular/PCS Cross-Ownership Rule)	

PETITION FOR RECONSIDERATION OF
DEVON MOBILE COMMUNICATIONS, L.P.

Devon Mobile Communications, L.P. ("Devon"), by its attorneys, herein seeks reconsideration of a number of F Block rule changes that, if remain unaltered, will inhibit designated entity participation in the F Block auction. In particular, Devon opposes the Commission's decision to offer significantly less generous license payment terms to small businesses participating in the F Block auction.^{1/} Recent rule changes are unsupported by the record in the above referenced proceedings and are contrary to Congress' explicit statutory mandate to encourage small business participation in the wireless industry.

I. Introduction

Devon was an active participant in the C Block PCS auction and was the high bidder on twelve 30 MHz C Block licenses. As a small business, Devon's own success reflects the success

^{1/} See Report and Order, Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, WT Docket No. 96-59, GN Docket No. 90-314 (adopted June 21, 1996, released June 24, 1996) ("Report and Order").

of the C Block rules in promoting diversity and providing small businesses with financial incentives necessary to make them a competitive force in the auction process. In particular, the Commission-sponsored installment payment plan was integral to Devon's ability to access capital needed to compete for broadband PCS licenses and to plan for the future financing of system construction and operation. Without this critical support, however, Devon's success would not have been possible, and its entry into the wireless marketplace could not have been achieved.

Without explanation, the Commission now would deprive Devon and other small businesses of this critical benefit on the eve of the last broadband PCS auction in which they will be offered bidding preferences. Indeed, contrary to all record evidence and without justification, the Commission altered its designated entity rules to provide small businesses less generous payment terms, directly restricting their ability to compete for F Block licenses. These changes are unsupported and, therefore, an illegal exercise of agency authority.

II. The Record Does Not Support The Reduced Interest-Only Payment Period

Pursuant to the C Block auction rules, small business PCS licensees are permitted to pay for their licenses through an installment payment plan that required a 10% down payment and interest-only payments for the first six years, with interest and principal payments made during the remaining four years of the 10-year installment payment period.^{2/} In June, the Commission modified the F Block rules to require a 20% down payment and interest-only payments for only

^{2/} See Sixth Report and Order, 11 FCC Rcd 136, 156 (1995).

two years.^{3/} These changes have a dramatic effect on the financial plans of all small businesses seeking to enter the PCS market and will inhibit directly their ability to compete in the F Block auction. Yet, the Commission provides no reasoned analysis for modifying the rules.

As a basis for denying small businesses the benefits of the C Block payment scheme, the Commission concludes that "after two years of interest-only payments, licensees should be capable of beginning to make principal payments."^{4/} The Commission, however, provides no evidence or analysis to support this conclusion in light of comments filed in this proceeding recognizing that the bid prices for 10 MHz PCS licenses may not be substantially less than their 30 MHz counterparts.^{5/} There simply is no basis for concluding that the capital requirements for purchasing an F Block license or building the related network will be less severe, or more easily addressed by potential auction participants, than the considerable capital requirements required in the C Block auction. Moreover, there is no record evidence indicating that small businesses participating in this auction are better positioned to access capital than participants in the C Block auction.^{6/} In fact, the determination to subject F Block small businesses to more onerous payment requirements will disadvantage them as they seek to compete with A, B, D, E and C

3/ See Report and Order at ¶42.

4/ See Report and Order at ¶45.

5/ See e.g., Comments of DCR at 8-9 (filed April 15, 1996); Comments of Liberty Cellular at 7-8 (filed April 15, 1996); Comments of National Telecom at 3-4 (filed April 15, 1996); Comments of North Coast Mobile Communications, Inc. at 10 (filed April 15, 1996); Comments of PCS Development Corp. at 6-7 (filed April 15, 1996); Comments of U.S. Intelco Wireless Communications, Inc. at 1 (filed April 15, 1996); Comments of Virginia PCS Alliance, L.C. at 7 (filed April 15, 1996); and Comments of WPCS, Inc. at 4 (filed April 15, 1996).

6/ See Sixth Report and Order at 158-159 (recognizing that C Block installment payment terms designed solely for small businesses "will give designated entities an opportunity to participate in the provision of spectrum-based services").

Block licensees in the construction of their PCS systems and in offering a mobile service in an increasingly competitive wireless marketplace.⁷

The Commission's rationale that less preferential installment payment terms are required because the construction requirements for 10 MHz licenses are "more liberal" is equally flawed. The Commission ignores market dynamics that require all PCS licensees to provide complete coverage in their service areas in the near term. Providing financing only to permit 10 MHz licensees to cover one-fourth of their service areas in the first five years will disadvantage them in competing with other carriers, supplementing their existing systems or entering into mutually beneficial roaming and other agreements with co-carriers. The Commission does not support the entry of small businesses if it simply provides them access to capital that permits only minimal build-out and service delivery. Meaningful competition from small businesses only will result if they are afforded access to the capital needed to provide a competitive wireless service.

Moreover, reducing the interest-only payments to two years will strain the resources of small businesses at a time when financial support is most needed. As the FCC previously concluded, the benefits of the Commission's installment payment plan are critical during the first six years, while systems are being constructed and resources are dedicated primarily to the initial

^{7/} Significantly, the rule changes disadvantage women and minorities more than other small businesses to the extent that the Commission's rules already have failed to provide specific preferences for these bidders. At least in the C Block auction, the Commission offered these groups meaningful preferences through the considerable benefits afforded to all small businesses. See Sixth Report and Order at 159 ("Although the revised rules do not specifically target minorities and women, we realize that because a large number of minority- or women-owned businesses are small businesses, our new rules will nonetheless, afford designated entities opportunities to participate in the C Block auction."). The Commission's most recent rule changes, however, will dilute these preferences further, failing to address the unique capital restrictions faced by these bidders and decreasing the potential for diverse participation in the F Block auction.

launch of the PCS service. In establishing the current small business installment payment plan in the winter of 1994, for instance, the Commission expressly recognized the importance of timing the payment of principal in a manner that does not harm the ability of small businesses to build out their PCS systems. Indeed, the Commission, on its own motion, extended the interest-only payments an additional year to six years to "assist the designated entity in avoiding an unwanted sale of business at the five-year mark in order to avoid payment of principal."^{8/} For the same reasons, the Commission must retain the six-year interest-only provision in recognition of the fact that after two years small businesses will continue to experience considerable financial demands that will make principal payments difficult, if not impossible, to make.

By year two, most if not all PCS licensees still will be experiencing operating losses in building their systems and may not be cash flow positive until several years later. At that time, it will be difficult to renegotiate existing financial vehicles and access supplemental capital to accommodate the additional installment payments. Understandably, investors will be cautious about investing in companies that have only constructed a portion of their system, e.g. perhaps only 20 percent by year two. In contrast, the ability to seek additional financing to support the increased installment payments is enhanced in year six, when 80-90% of the system is constructed and significant business plan milestones have been achieved. Unless effective financing is afforded small businesses during the early stages of the development of their service, the Commission may find its successes in encouraging small business participation to be short-lived as companies face potential financial distress only two years after being licensed.

^{8/} See Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 460 (1994).

Finally, the Commission's concern regarding insincere bidding is equally unfounded as a basis to impose more onerous payment obligations on F Block licensees. In the C Block auction only two out of 89 winning bidders defaulted based on their unique circumstances. There is no evidence that the Commission's C Block installment payment plan contributed to the default or encouraged speculative bids.^{9/} That the actual cost of the license is not recognized until later in the license term is the very benefit the Commission now inexplicably views as potentially dangerous. The Commission comes to this conclusion without any evidence of PCS licensees ultimately defaulting late in the license term, once the stepped-up installment payments are required. To date, no PCS licensee has defaulted on its payment obligations because its installment payments have increased to include principal payments.

Accordingly, before the auction commences, the Commission should conform its F Block small business interest and principal payment provisions to those applied in the C Block auction. Unless adequate financial incentives are in place to promote and support small business participation in the F Block auction, the Commission, by its own design, will undermine the successes achieved in the C Block auction.

III. The Record Does Not Support the Substantial Increase in the F Block Down Payment Requirements

Under prior rules, small businesses were required to submit a down payment of 10 percent of the value of the net high winning bids to hold PCS licenses set aside for designated

^{9/} Indeed, the defaults which have occurred have been precipitated by events which could not have been predicted, rather than by speculation or bad faith bidding. See e.g., Petition for Reconsideration, BDPCS, Inc. (filed May 22, 1996); see National Telecom PCS, Inc. Request for Waiver of Bid Withdrawal Payment (filed May 15, 1996).

entity bidding.^{10/} This reduced down payment successfully was implemented in the C Block auction resulting in approximately 254 qualified and active C Block bidders at the commencement of the auction. Nevertheless, that Commission has now modified its down payment rules to impose a 20 percent down payment requirement on all F Block bidders. This change will increase considerably the upfront capital required to bid in the auction and to hold F Block licenses, thereby inhibiting potential small business participation.

For many parties, a reduced down payment made participation feasible. As the record confirms, small businesses traditionally have faced significant barriers to accessing capital. The reduced down payment directly addressed this concern by reducing the initial cash outlay required to hold C Block licenses.^{11/} As such, it permitted immediate auction participation and afforded small businesses an ability to access additional capital during the auction process and during the initial stages of system build-out. The determination to require a higher down payment in the F Block will prevent many companies from bidding at the outset, foreclosing opportunities for meaningful participation even before the auction begins.

Moreover, raising the down payment for F Block participation will undermine business plans that have relied on the reduced payment to predict capital requirements for both the C and F Block auctions. Indeed, the modification increases the down payment by 100 percent above the original amount. This significant change will place unanticipated financial burdens on small businesses, specifically frustrating established business plans based on an ability to aggregate

10/ See Fifth Report and Order, 9 FCC Rcd 5532, 5591-5593 (1994); Fifth Memorandum Opinion and Order, 10 FCC Rcd at 403, 459 & 460.

11/ Id.

PCS spectrum to 40 MHz.¹² With the increased financial burdens on small businesses, F Block bidders will find it more difficult to complement their 30 MHz PCS holdings with 10 MHz licenses. As such, they will be disadvantaged in competing with cellular and other telecommunications companies that have the financial resources to aggregate PCS and other CMRS spectrum to up to 45 MHz of spectrum in a given geographic area.

IV. Conclusion

For the foregoing reasons, Devon urges the Commission to revise its F Block rules to offer small businesses the same financial incentives made available in the C Block auction.


^{12/} The Commission repeatedly has recognized the benefits of aggregating PCS spectrum through the competitive bidding process. See e.g. Memorandum Opinion and Order, 9 FCC Rcd 4957, 4985 ("Interspersing the 10 MHz blocks between each 30 MHz block facilitates aggregation to 40 MHz by allowing combination of each contiguous 30 MHz and 10 MHz license pair"); Id. at 4981 ("[p]roviding a combination of 30 MHz and 10 licenses MHz provides the benefits of 40 MHz , without restricting the options of firms nor affecting competition").

Unless the more preferable installment payment terms of the C Block auction are made available in the F Block, small businesses will be unable to establish themselves as long-term competitors in the wireless marketplace.

Respectfully submitted,

DEVON MOBILE COMMUNICATIONS, L.P.

By:


Leonard J. Kennedy
Richard S. Denning

Its Attorneys

DOW, LOHNES & ALBERTSON
A Professional Limited Liability Company
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

(202) 776-2500

July 31, 1996